

FILED

NOT FOR PUBLICATION

FEB 27 2006

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

MANUEL AGUSTIN OLIVA-OSUNA,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 03-74338

Agency No. A35-822-138

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted November 18, 2005**
Submission Withdrawn November 29, 2005
Resubmitted February 27, 2006
Pasadena, California

BEFORE: CANBY, SILER, *** and BERZON, Circuit Judges.

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument pursuant to Fed. R. App. P. 34(a)(2).

***The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

Petitioner Manuel Agustin Oliva-Osuna (“Osuna”), a Mexican native, seeks review of an October 31, 2003, decision of the Board of Immigration Appeals (“BIA”) denying his request for cancellation of removal from the United States. In its decision, the BIA affirmed the determination of the Immigration Judge (“IJ”) to deny relief of cancellation of removal because Osuna had been convicted of an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) for a previous violation of CALIFORNIA VEHICLE CODE § 10851(a). Because Penuliar v. Gonzales holds that (1) a California conviction for unlawful driving or taking of a vehicle does not categorically qualify as “theft offense”; and (2) under the modified categorical approach, charging documents and abstract of judgment were insufficient to establish that alien’s conviction for unlawful driving or taking of vehicle was for a theft offense, Osuna’s petition for review is granted. ___ F.3d ___, 2006 WL 156849, *7-8 (9th Cir. Jan. 23, 2006) (amending Penuliar v. Ashcroft, 395 F.3d 1037 (9th Cir. 2005), and denying rehearing en banc). As in Penuliar v. Gonzales, nothing shows that Osuna “took and exercise[d] control over a stolen car,” and therefore Osuna could have pleaded guilty as an accomplice. Id. at *7. Since Osuna’s order of removal was based upon a conviction that was not an aggravated felony, this case is remanded to the BIA to consider the merits of Osuna’s cancellation of removal claim. See Ferreira v. Ashcroft, 382 F.3d 1045, 1051 (9th Cir. 2004) (remanding to BIA to

determine eligibility for cancellation of removal under 8 U.S.C. § 1229b(a) because order of removal was not based upon conviction for an aggravated felony).

Osuna also argues that the IJ denied him representation by not allowing his attorney “time to review documents and prepare a defense by holding the ‘on the spot’ telephonic hearing.” He waived this issue by failing to object or demonstrate prejudice. See Taniguchi v. Schultz, 303 F.3d 950, 955 (9th Cir. 2002). Nevertheless, on remand, he should have sufficient time to prepare his defense.

Osuna’s petition is GRANTED and this cause is REMANDED to determine whether Osuna is eligible for cancellation of removal.